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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 744

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

vs.

LEON SPENCER,
Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW Dr. George J. Beto, Director of the Texas Department of Corrections, hereinafter designated Petitioner, complaining of Leon Spencer, hereinafter designated Respondent, and requesting that this Court grant a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit in the cause and for the reasons set forth below.

I.

Review is sought of the cause styled Leon Spencer v. Dr. George J. Beto and being cause number 25548 on the docket of the United States Court of Appeals

for the Fifth Circuit and reported at 298 F.2d 500, copy of which is attached hereto as Appendix A for the convenience of the court.

II.

The jurisdiction of this court is invoked pursuant to Rule 19 and Rule 23 of this Court based upon the following:

A. The opinion of the Court of Appeals was issued on July 18, 1968. Timely motion for rehearing was filed on July 30, 1968. Mandate was issued on August 20, 1968.

B. Petitioner's motion for rehearing was denied August 12, 1968. Petitioner has sought no order extending the time for filing petition for certiorari beyond November 10, 1968, (the due date).

C. This petition for certiorari is authorized under the provisions of Title 28 §§ 1254, 2101, United States Code.

III.

The following questions are presented for review:

A. Did the Court of Appeals err in applying the principles of *Witherspoon v. Illinois,* (1968) 391 U.S. 510, to the instant cause where the stipulation of the parties clearly recited that jurors who were excused for cause stated *unequivocally* that they *could not, in any case,* inflict the death penalty?

B. Did the Court of Appeals err by construing Texas procedure for selecting jurors in a capital case in a manner which conflicts with the construction of such procedure placed by the Texas Court of Criminal Appeals and without

inspecting the voir dire examination of prospective jurors (which was tendered to the Court of Appeals)?

IV.

The Constitutional provisions involved are the Sixth and Fourteenth Amendment to the Constitution of the United States, to-wit:

A. VIth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. XIVth Amendment (pertinent portion).

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.

Respondent was convicted in August, 1964, of the murder of his wife. He had theretofore been convicted

of the murder of his first wife and under Texas recidivist statutes he was charged with repetition of capital offenses. Under Texas law (and the proof adduced) the jury had a choice between life imprisonment and death in the electric chair. The jury fixed the punishment at death.

He appealed to the Court of Criminal Appeals of Texas (court of last resort for criminal matters) on only one of various grounds presented in the instant cause. His case was affirmed.

This Court granted certiorari on the propriety of Texas recidivist statutes. The case was affirmed in *Spencer v. Texas,* 385 U.S. 554 (1967). On September 12, 1967, Respondent was sentenced to be executed on November 20, 1967.

Respondent then applied to the Criminal District Court of Jefferson County, Texas, (the original trial court) for a writ of habeas corpus setting forth the following grounds:

(1) That Texas' license to juries in capital cases to choose between the penalties of life and death, in the jurors' unfettered, unreviewable and unregulated discretion, deprived petitioner of his life in violation of the rule of law essential to the Due Process Clause.

(2) That Texas' practice of trying the issues of guilt and punishment simultaneously in a capital case was fundamentally unfair, and unconstitutionally forced petitioner to elect between his privilege against self-incrimination and his right of allocution.

(3) That the exclusion from petitioner's trial jury of persons conscientiously scrupled

against the death penalty deprived petitioner of a jury that was a cross-section of the community, and resulted in an unfair and biased jury.

(4) That the death penalty imposed upon petitioner constituted (for several reasons) cruel and unusual punishment.

(5) That the admission of evidence of a former conviction under the Texas recidivist statute denied petitioner a fair trial as guaranteed by the due process clause.

This petition was denied without hearing on October 6, 1967. A similar application was denied by the Texas Court of Criminal Appeals on October 19, 1967, without written order.

On November 9, 1967, the instant petition for habeas corpus was filed in the United States District Court (Eastern District, Texas, Beaumont Division), urging the five grounds set forth supra and the additional ground (for the first time) that respondent, under the Due Process and Equal Protection clauses of the United States Constitution, was entitled to court appointed counsel during the period between the termination of appellate procedures and execution.

Hearing was set for November 14, 1967. At such hearing United States District Judge Joe J. Fisher first indicated an intention to deny all relief out of hand but subsequently determined to hold a hearing on November 16, 1967, and instructed counsel for respondent to present affidavits of expert witnesses and suggested stipulations to support his various points.

At the November 16th hearing counsel for Respondent submitted a suggested stipulation setting forth the

proof which he thought would be available to show by expert testimony that jurors having no conscientious scruples against death would be more likely to convict than jurors who expressed conscientious scruples (and related matters). This suggested stipulation was accepted by the court over objection by and without concurrence of counsel for petitioner. Testimony was also taken from a representative of the N.A.A.C.P. Legal Defense Fund as to what could be offered in the way of expert testimony if more time was available.

Also a stipulation was entered into by agreement between counsel for both parties and accepted by the court as to the number of prospective jurors excused for cause and the extent to which they showed themselves unable to vote for the death penalty. This stipulation is reproduced from the reporter's notes and attached hereto as Appendix B.

The United States District Court ruled against respondent and appeal was taken to the United States Court of Appeals with the sole specification of error that the District Court had erred by not granting a full evidentiary hearing on the six alleged specifications. Notice of Appeal was filed on December 13, 1967, and the Court of Appeals ordered the hearing expedited.

After briefs had been submitted and arguments had been heard, the United States Supreme Court issued its opinion in *Witherspoon v. Illinois,* 391 U.S. 510. Subsequent thereto the Court of Appeals issued the opinion which is the subject of this petition for certiorari. Petitioner raised the points submitted herein on motion for rehearing but same was overruled without opinion. It was in such motion for rehearing that

petitioner made a tender to the court of a transcript of the voir dire interrogation of prospective jurors at the original trial.

VI.

Respondent relied on 28 U.S.C. §§ 2241 and 2242 and the XIVth Amendment to the United States Constitution to establish jurisdiction in the United States District Court.

VII.

As a general prelude to specific discussion of each of the grounds set forth as bases for the granting of a writ of certiorari, petitioner would like to call the attention of the court to the three different ways in which the instant decision creates compelling legal reasons for review by this Court to-wit:

1. The United States Court of Appeals has decided an important question of federal constitutional law which has not been, but should be, settled by the Supreme Court of the United States.

2. The United States Court of Appeals has decided a federal constitutional question in a way in conflict with applicable decisions (if, indeed *Witherspoon v. Illinois* is applicable) of the Supreme Court of the United States.

3. The United States Court of Appeals has decided an important state question in a way in conflict with applicable state law.

A.

PETITIONER'S FIRST POINT RESTATED

Did the Court of Appeals err in applying the principles of *Witherspoon v. Illinois,* (1968) 391 U.S.

510, to the instant cause where the stipulation of the parties clearly recited that jurors who were excused for cause stated *unequivocally* that they *could not, in any case,* inflict the death penalty?

In the Opinion of the Court of Appeals entered on July 18, 1968, the following statement appears in footnote 3 on page 502 of the opinion.

> "The stipulation entered into below indicates that these veniremen may have had very strong scruples against the death penalty. However, the nature of their scruples does not rise to the situation discussed in *Witherspoon* where the veniremen are opposed to capital punishment 'that they would *automatically* vote against the imposition of capital punishment *without regard to any evidence that might be developed at the trial of the case before them,* (Emphasis added by the Court) or . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.' *Witherspoon v. Illinois,* 1968, 391 U.S. 510, 36 U.S.L.W. 4504, n. 21 (U.S., June 4, 1968)."

The pertinent portion of the stipulation (See Appendix A) states:

> "A number of the remaining veniremen, aside from those who were selected as the final twelve, were excused for various reasons, included among these were *twenty-one who were challenged for cause and excused by the Court for the reason that* they had scruples against the infliction of the death penalty and *who stated unequivocally that they could not, in any case, inflict the death penalty."* (Emphasis added.)

and further states:

> ". . . not been allowed to strike for cause those

persons opposed to the death penalty *unequivocally*, . . ." (Emphasis added.)

and further states:

". . . the jury having persons thereon who were *unalterably* opposed to the law of the case, a portion of which was the death penalty." (Emphasis added.)

A comparison of the language used in *Witherspoon*, supra, and the language used in the stipulation in the instant cause clearly shows that *Witherspoon* is specifically not applicable as a grounds for reversing this case. As Mr. Justice Stewart stated at Page ____ of the *Witherspoon* opinion:

"The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. *Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them."* (Emphasis added.)

It is difficult to perceive how Mr. Justice Stewart could have been more emphatic in delineating that which remained outside the orbit of the *Witherspoon* decision. It is equally difficult to perceive how the judges of the Court of Appeals could hold that the stipulated mental position of the excused jurors did not exactly comport with the state of mind described by Mr. Justice Stewart—and the stipulation was entered into prior to the release of the *Witherspoon* opinion.

Petitioner submits that persons "who stated unequivocally that they could not, in any case, inflict the death penalty" (the instant case) and persons "who say that they could never vote to impose the death penalty" (the *Witherspoon* opinion) constitute a single, indivisible class. Any effort to differentiate these two descriptions is neither more nor less than an exercise in misguided semantics and such errant pedantry should not be allowed to sweep the carefully developed criminal jurisprudence of a sovereign state into oblivion at the stroke of a pen.

Petitioner strongly urges this Court to review this matter in the light of the same record as the Court of Appeals had before it and to hold again, as was done in the *Witherspoon* opinion, that this type of procedure is not condemned.

B.

PETITIONER'S SECOND POINT RESTATED

> Did the Court of Appeals err by construing Texas procedure for selecting jurors in a capital case in a manner which conflicts with the construction of such procedure placed by the Texas Court of Criminal Appeals and without inspecting the voir dire examination of prospective jurors (which was tendered to the Court of Appeals)?

Subsequent to the instant decision, the Court of Criminal Appeals of Texas had occasion to interpret the Texas practice of choosing juries in death penalty cases in the light of *Witherspoon v. Illinois,* supra, in *Pittman v. Texas,* —— S.W. (2d) —— (not yet reported but reproduced herein as Appendix C for the convenience of the Court). The opinion in *Pittman v.*

Texas clearly shows that the practice followed in Texas is neither identical nor consistent with the practice followed in Illinois and which was condemned in *Witherspoon.*

Perhaps the most important section of the *Pittman* decision is the following portion which covers the traditional Texas practice and which was amply supported by the *Pittman* record:

> "It has long been the traditional practice in Texas, before and after the effective date of the 1965 Code, not to excuse a juror in capital cases who simply stated he had conscientious scruples against the death penalty but to interrogate such juror further to determine if this means that he or she could never vote for the death penalty. The challenge for cause on this ground has always been understood to mean that because of such scruples the juror could never vote to inflict the death penalty in any case regardless of the facts or circumstances. Until this appeared the challenge for cause was not sustainable. Such practice squares with the requirements of Witherspoon.
>
> "Normally, the prosecutor will clearly establish the juror's disqualification on this ground before challenging for fear that the juror may be re-qualified upon further interrogation and explanation by the defense or the court (See also Article 35.18, (617) V.A.C.C.P.), and then he will be confronted with the choice of accepting a juror who may have been offended by the premature challenge or unnecessarily using a peremptory challenge.
>
> "As earlier noted, prior to the 1965 Code of Criminal Procedure both parties could use the 'conscientious scruples' challenge for cause, and neither side wanted the other to have a 'windfall' without clearly determining that the juror's scru-

ples were such that he would automatically vote against capital punishment regardless of the facts. Such factor undoubtedly contributed to the growth of the traditional practice in this state."

Although this Texas decision was not available to the United States Court of Appeals when the opinion was written, it was called to their attention on petition for rehearing. The Court of Appeals refused to recognize *Pittman v. Texas* and overruled the petition for rehearing without comment.

In the opinion in *Pittman v. Texas* (supra) the Texas Court of Criminal Appeals stressed the fact that Judge Onion (and possibly the other judges) had read a transcript of the voir dire examination of the members of the entire jury panel in order to determine that the procedure in the *Pittman* case was actually consistent with the description of traditional practice set forth in the opinion. With this in mind, Petitioner (in motion for rehearing) offered to have the court reporter's notes transcribed and forward to the United States Court of Appeals for examination (Petitioner having theretofore ascertained that such notes were available as to the entire panel).

This tender of the voir dire examination was made in an effort to make full disclosure even though the burden of proof was still on Respondent at that time and even though the stipulation entered into before the court should have covered the matter. Petitioner still stands ready to furnish this record upon request to this Court, or to any court of competent jurisdiction, to show that the traditional Texas practice was followed.

And lest an argument be advanced that *Pittman v.*

Texas (Appendix B) is an effort by a Texas court to circumvent *Witherspoon v. Illinois* (supra) attention is called to the opinion of the Texas Court of Criminal Appeals in *Clarence Wesley Evans v. Texas,* 430 S.W. (2d) 502, (reproduced and attached hereto as Appendix D for the convenience of the Court) in which a death penalty was reversed because the trial court declined to have a stenographic record made of the voir dire examination of prospective jurors.

The Texas Court of Criminal Appeals has recently issued (October 30, 1968) three opinions applying *Witherspoon v. Illinois* (supra) to Texas cases (none of which are yet reported but all of which are attached hereto as appendices as indicated) to show that normal Texas procedure will render Texas cases outside *Witherspoon v. Illinois* but that the Texas Court of Criminal Appeals accepts and will apply the rationale of *Witherspoon v. Illinois* where applicable.

Ellison v. Texas, October 30, 1968 (Appendix E).

Ex parte William Clark Bryan, Jr., October 30, 1968 (Appendix F).

William Scott, Jr. v. Texas, October 30, 1968 (Appendix G).

Although Petitioner still feels that the stipulation discussed in Point A (supra) is dispositive of the issue, nevertheless Petitioner strongly urges that these cases disclose the importance of an inspection of the voir dire examination of prospective jurors if the express stipulation is insufficient. It would then seem incumbent on the Court of Appeals to either accept Respondent's tender or to order the lower court to receive and examine same.

These interpretations of Texas law are binding on the Federal Courts in their consideration of the issues covered by such opinions. *Cox v. New Hampshire,* 312 U.S. 569; *Poulos v. New Hampshire,* 345 U.S. 395; *Shuttlesworth v City of Birmingham,* 382 U.S. 87; *Cox v. Louisiana,* 379 U.S. 538.

WHEREFORE, PREMISES CONSIDERED, Petitioner urges the Court to grant a Writ of Certiorari to the United States Court of Appeals (Fifth Circuit) to review the errors alleged herein and to correct same.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

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Executive Assistant Attorney General

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JIM VOLLERS
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Assistant Attorneys General

By ----------

CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Certiorari has been served on counsel for petitioner by depositing same in the United States Mail, postage prepaid, addressed to Mr. Anthony G. Amsterdam, 3400 Chestnut Street, Philadelphia, Pennsylvania; Mr. Michael D. Matheny, 635 San Jacinto Bldg., Beaumont, Texas; Mr. Jack Greenberg and Mr. Jack Himmelstein, 10 Columbus Circle, New York, New York, this the ____ day of _____, 1968.

HOWARD M. FENDER
Assistant Attorney General

APPENDIX A

Spencer v. Beto, 298 F.2d 500

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25548

LEON SPENCER,

Appellant,

versus

DR. GEORGE J. BETO, DIRECTOR, Texas Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(July 18, 1968)

Before THORNBERRY, AINSWORTH and DYER, Circuit Judges.

DYER, Circuit Judge: Appellant, represented by court-appointed counsel, was convicted in August 1964, of murder with malice for killing his second wife. He was sentenced to death under the Texas recidivist procedure.[1] His conviction was affirmed by the Texas Court of Criminal Appeals, *Spencer v. Texas,* 1965, 389 S.W. 2d 304, and by the Supreme Court of the United

[1]Appellant had previously been convicted of murder with malice for killing his first wife.

States, *Spencer v. Texas,* 1967, 385 U.S. 554. Appellant was resentenced to death in September 1967 by the trial court, sentence to be carried out November 20, 1967. Counsel immediately filed a petition for a writ of habeas corpus with that court, alleging most of the claimed Constitutional infirmities presented to us as grounds for appellant's release. The petition was denied, without a hearing, on October 6, 1967. On October 19 the Court of Criminal Appeals denied appellant's application for a writ of habeas corpus. Court-appointed counsel, who had continued to represent appellant, then filed a petition in the United States District Court. Hearings were held on November 14 and 16, after which the District Court denied the petition. A stay of execution and certificate of probable cause were granted by this Court on November 16.

Before this Court, appellant urges that the District Court committed reversible error by allegedly denying appellant an evidentiary hearing for which his attorney had argued long and hard and at which experts would have testified to the psychological and sociological impact of capital punishment in modern America. However, the record reveals that when it was established that no evidentiary hearing had been held in the state courts, the District Court made it clear that a hearing was necessary. To conserve time and expense the District Court suggested that it would accept counsels' stipulation as to what the witnesses would say if called to testify in person. Appellant's counsel immediately accepted this suggestion and urged that such a procedure be followed. The case was continued to allow appellant's counsel to assemble all evidence he wished to present to the court by stipulation or otherwise. When the court later reconvened

to receive the evidence, appellant's counsel answered that he was not prepared to proceed on a full evidentiary hearing, but offered a stipulation (which was accepted over the objection and without the signature of counsel for the state) setting forth the names of witnesses and the testimony they would give if called. Appellant's counsel also offered a witness to testify. The District Court, at that time, made it crystal clear that it was adhering to the order (to which counsel had previously agreed) that this was a full evidentiary hearing. To now say that the District Court "erred in not affording petitioner the chance for a full evidentiary hearing on the substantive contentions urged" is simply a distortion of the record which we will not accept.

Subsequent to the filing of briefs and oral argument in this case the Supreme Court of the United States decided the case of *Witherspoon v. Illinois,* 1968, —— U.S. ——, 36 U.S.L.W. 4504 (U.S. June 3, 1968). In furtherance of the expeditious disposition of the case *sub judice* we will proceed to determine the applicability of that decision to appellant's sentence. At the time of appellant's trial Texas law provided that a juror could be challenged for cause by the state if "the juror has conscientious scruples in regard to the infliction of the punishment of death for crime."[2] This statute is interpreted by the Texas courts to give a challenge for cause when "the venireman has conscientious scruples *against* the infliction of the death penalty." *E.g., Crain v. Texas,* Tex. Ct. Crim. App. 1964, 394 S.W.2d 165, 171. (Emphasis added.) There is no provision in

[2]Tex. Code Crim. P. Ann., Art. 616.692, 673 (1941). The substance of this provision has been brought forward as Tex. Code Crim. P., Art. 35.16 (b) (1).

Texas law for challenging for cause if a venireman has scruples *in favor* of the death penalty. It was stipulated before the District Court that in this case there was a sufficient number of veniremen with scruples against capital punishment that, had the state not been able to challenge them for cause, it would not have had a sufficient number of peremptory challenges to remove all scrupled jurors from the panel. These same facts are contained in the habeas corpus petition to the Texas state courts which was properly before the District Court. Therefore, the Supreme Court's holding in *Witherspoon* "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois, supra* at 4507, is equally applicable to this case. The sentence of death cannot stand.[3]

The other substantive constitutional issues argued on behalf of appellant are, in light of our holding appellant's sentence invalid, without merit. The argu-

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[3]The stipulation entered into below indicates that these veniremen may have had very strong scruples against the death penalty. However, the nature of their scruples does not rise to the situation discussed in *Witherspoon* where the veniremen are opposed to capital punishment "that they would *automatically* vote against the imposition of capital punishment *without regard to any evidence that might be developed at the trial of the case before them,* [Emphasis added.] or . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" *Witherspoon v. Illinois,* 1968 —— U.S. ——, 36 U.S.L.W. 4504, 4507, n. 21 (U.S., June 4, 1968) Neither does the stipulation, or any other evidence, show that "this jury was biased with respect to the petitioner's guilt." *Witherspoon v. Illinois, supra* at 4506.

ments that absence of standards under which the jury determined that the death penalty should be imposed violates due process, that simultaneous submission of the issues of guilt and punishment violated appellant's rights under the Fifth and Fourteenth Amendments, that capital punishment constitutes cruel and unusual punishment both *per se* and in the manner in which it is determined, and that due process is violated by the introduction, in single trial proceedings, of former convictions for the purpose of enhancing the punishment under the state's recividist procedure, are all moot. These contentions have no relation to the question of this appellant's guilt or innocence, but would have a bearing only upon his death sentence, which we have just held invalid.[4] Appellant has also urged that the Constitution guarantees him the right to counsel during the period from appeal to execution of sentence, and that this right has been infringed. This argument is frivolous for several reasons. First, appellant has no standing to complain because he has *never* been without counsel. Second, this issue concerns the death sentence rather than the question of guilt or innocence and is therefore moot. Finally, appellant has failed to present this question to the state courts.

The denial of the petition for a writ of habeas corpus is REVERSED as to the sentence of death, subject to

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[4]Appellant's argument on introduction of prior convictions was presented to both state and federal courts on direct appeal and was consistently resolved against him. *Spencer v. Texas*, 1967, 385 U.S. 554; *Spencer v. Texas*, Tex. Ct. Crim. App. 1965, 389 S.W.2d 304. Appellant's contention that the death penalty itself violates the Eighth Amendment has not been accepted by the Supreme Court. *See Witherspoon v. Illinois*, 1965, —— U.S. ——, 36 U.S.L.W. 4504, 4512 (U.S. June 4, 1968) (Mr. Justice White dissenting).

the right of the state to resentence appellant within a reasonable time and to retain custody of appellant during that time, and is REMANDED to the District Court for further proceedings not inconsistent herewith.

APPENDIX B

Stipulation

STIPULATION

(From pages 76-78, Statement of Facts)

MR. LINDSEY (For Petitioner)

MR. MATHENY (For Respondent)

MR. LINDSEY: I want to be certain— that we can agree and stipulate on the number of jurors that we interrogated and the number of jurors excused.

THE COURT: The Court would like for you to make that stipulation.

MR. LINDSEY: All right.

REPORTER'S NOTE: Counsel for the parties here conferred out of the hearing of the Court Reporter.

MR. MATHENY: Yes, here it is.

REPORTER'S NOTE: An instrument was then handed to Mr. Lindsey.

MR. LINDSEY: It is stipulated and agreed by and between Respondent—by and between Respondent and Petitioner that in the trial of the case of the State of Texas versus Leon Spencer that seventy-four veniremen were examined, six were excused by agreement, thirteen peremptory challenges out of a possible fifteen were used by both the State and the Defendant. A number of the remaining veniremen, aside from those who were selected as the final twelve, were excused for various reasons, included among those were twenty-one who were challenged for cause and excused by the Court for the reason that they had scruples against the infliction of the death penalty and who

stated unequivocally that they could not, in any case, inflict the death penalty.

REPORTER'S NOTE: Counsel for the parties here conferred out of the hearing of the Court Reporter.

MR. LINDSEY: Pardon me just a moment.

REPORTER'S NOTE: Counsel for the parties continued conferring out of the hearing of the Court Reporter.

MR. LINDSEY: It is further stipulated and agreed that had the State not been allowed to—not been allowed to strike for cause those persons opposed to the death penalty unequivocally, that the State would not have had enough peremptory challenges to have seated a jury without, in all reasonable probability, the jury having persons thereon who were unalterably opposed to the law of the case, a portion of which was the death penalty.

THE COURT: Do you have anything further, Mr. Matheny?

APPENDIX C

Pittman v. Texas, —— S.W. 2d ——
(October 30, 1968)

No. 41,393

MELVIN STUART PITTMAN, Appellant

Vs.

THE STATE OF TEXAS, Appellee

Appeal from TARRANT County

OPINION

The offense is murder; the punishment, death.

We are squarely confronted with the question of whether the exclusion by the trial court of prospective jurors who had conscientious scruples against the infliction of death as a punishment for crime deprived appellant of his constitutional right to a trial by a fair and impartial jury. This is the first time this Court has been called upon to pass upon such a ground of error since the decision of the United States Supreme Court in *Witherspoon v. Illinois,* —— U.S. ——, 36 L.W. 4504, 3 Cr.L. 3109, upon which appellant relies, and which, of course, is to be applied retroactively.[1]

In Witherspoon the Court held that due process voided a death sentence imposed by a jury from which were excluded all persons expressing general objections to or conscientious or religious scruples against capital punishment.

In view of a vast amount of misinformation disseminated, it is perhaps important that it be established at the outset what Witherspoon did not hold. It did not outlaw the death penalty as a punishment for crime. It did not hold that the imposition of death under the

[1]See footnote 22 of the Witherspoon opinion.

Illinois statute involved was unconstitutional,[*] nor did it hold that the death penalty constitutes cruel and unusual punishment offending the Eighth Amendment nor, as noted by Mr. Justice White in his dissenting opinion, does the decision prohibit a State Legislature from specifying only death as the punishment for certain crimes, so that the penalty is imposed automatically upon a finding of guilt, with no discretion in judge or jury.

The majority of the Court made clear their ruling by stating:

> "* * * Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.
>
> "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law."

The holding is clarified to some extent by Mr. Justice Stewart, who delivered the majority's opinion, when he wrote:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to chal-

[*]Cf. *U.S. v. Jackson*, —— U.S. ——, 3 Cr.L. 3003, where the Court invalidated the death penalty provision of the Federal Kidnapping Act. See also *Pope v. United States*, 3 Cr.L. 4096; *State v. Forcella*, 3 Cr.L. 2289 (N.J.S.Ct.).

lenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." See also footnote 21 of said majority opinion.

Mr. Justice Black, dissenting, characterized the holding as "very ambiguous" and further stated

> "* * * For as I read the opinion, the new requirement placed upon the States is that they cease asking prospective jurors whether they have 'conscientious or religious scruples against the infliction of the death penalty,' but instead ask whether 'they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.' (See majority opinion, n. 21)."

In Texas "conscientious scruples" was a cause for challenge prior to the enactment of the Code. *White v. State,* 16 T. 207 (1856); *Burrel v. State,* 18 T. 713 (1857); *Hyde v. State,* 16 T. 446; 35 Juris. 2d, Jury, Sec. 198.

Prior to the adoption of the 1965 Code of Criminal Procedure the accused as well as the State had the right in capital cases to challenge for cause a juror who had conscientious scruples concerning infliction of the death penalty. *Taylor v. State,* 99 S.W.2d 609; *Jordan v. State,* 226 S.W.2d 449; *Prewitt v. State,* 167 S.W.2d 194. Cf. *Villereal v. State,* 61 S.W. 715. Further, the prosecutor in capital cases was permitted to

accept some jurors who had stated they had "conscientious scruples" but challenge others on this same ground. *Merkel v. State,* 171 S.W. 738; *Anderson v. State,* 90 S.W.2d 564. Such practice and procedure prevailed in every capital felony because death was a possible punishment. Two innovations in this area were wrought by the 1965 Code of Criminal Procedure and the 1967 amendments thereto. First, the State must give 15 days written notice prior to trial in any capital case that it intends to seek the death penalty. When the State makes known by written notice that it will not seek the death penalty, the defendant may enter a plea before the court, waive trial by jury and under no circumstances in such case may the death penalty be imposed. Article 1.14, V.A.C.C.P., as amended (Acts 1967, 60th Leg., p. 1733, ch. 659, Sec. 1, eff. Aug. 28, 1967). Second, challenges for cause were divided into three groups: (a) those that either the State or Defense could make, (b) those only the State could make, and (c) those only the Defense could make. Article 35.16, V.A.C.C.P. Under this division only the State may now challenge a juror for the reason that he has conscientious scruples in regard to the infliction of death as punishment. Article 35.16, Sec. b(1), supra. These changes mean that only in capital cases where the State has announced by written notice that it will seek capital punishment does "conscientious scruples" come into play.

Further attention is directed to the right of the State to challenge for cause any juror who has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment. Article 35.16 (b) (3), V.A.C.C.P. The defense has a

corresponding right. Article 35.16 (c) (2), V.A.C.C.P. See also former Article 616, V.A.C.C.P. 1925.

It has long been the traditional practice in Texas, before and after the effective date of the 1965 Code, not to excuse a juror in capital cases who simply stated he had conscientious scruples against the death penalty but to interrogate such juror further to determine if this means that he or she could never vote for the death penalty. The challenge for cause on this ground has always been understood to mean that because of such scruples the juror could never vote to inflict the death penalty in any case regardless of the facts or circumstances. Until this appeared the challenge for cause was not sustainable. Such practice squares with the requirements of Witherspoon.

Normally, the prosecutor will clearly establish the juror's disqualification on this ground before challenging for fear that the juror may be re-qualified upon further interrogation and explanation by the defense or the court (See also Article 35.18, (617) V.A.C.C.P.), and then he will be confronted with the choice of accepting a juror who may have been offended by the premature challenge or unnecessarily using a peremptory challenge.

As earlier noted, prior to the 1965 Code of Criminal Procedure both parties could use the conscientious "scruples" challenge for cause, and neither side wanted the other to have a "windfall" without clearly determining that the juror's scruples were such that he would automatically vote against capital punishment regardless of the facts. Such factor undoubtedly contributed to the growth of the traditional practice in this state.

Unlike the Texas statute or practice, the Illinois statute involved in Witherspoon provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

The jury in the case at bar was chosen or selected in the traditional Texas manner. Unlike Witherspoon, there was no effort to sweep from the jury panel all "conscientious objectors" in rapid succession without any effort to find out "whether their scruples would invariably compel them to vote against capital punishment." Except for the few members excused by agreement, the jury panel was examined separate and apart as required upon request by statute (Art. 35.17, V.A. C.C.P.[3]). Out of the 126 prospective jurors examined, the record reveals 42[4] who were excused after stating they had conscientious scruples against the infliction of death as a punishment. However, as we read the 827 pages of the voir dire examination, 38 of these 42 prospective jurors clearly stated in addition that they could never vote to impose the death penalty in any case or could not conceive or visualize any facts or circumstances which would cause them to vote for the death penalty or feel that it was justified. The court's action in sustaining the State's challenge for cause to

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[3]As to practice under former Code, see "Examination of Prospective Jurors in Capital Cases." A. R. Stout, 29 TLR 34 (1950).

[4]Juror R. P. Buckey (No. 82) testified he did not have conscientious scruples against the death penalty, but was disqualified when he stated he could never vote for death in the case of a teenager, and had a prejudice against the law which allowed the same. He was not included in the 42 jurors mentioned. See Article 35.16 (b) (3), V.A.C.C.P.

these members of the panel is clearly supported by the Witherspoon decision. One juror, Trudy Wilmoth, (No. 66) was excused without further interrogation after she testified she had "conscientious scruples" against the death penalty. She had previously stated, however, that she knew the Lairds, a husband and wife for whose murders appellant was also indicted and whose bodies were pointed out to police by appellant at the time of the discovery of the body of the deceased in the case at bar. It is not apparent from the record for which reason Mrs. Wilmoth was actually excused, but appellant made no objection at the time and we do not understand from the record or briefs that appellant contends that the court erred in excusing this juror. It might be argued that the answers of three[5] of the 42 prospective jurors who stated they had conscientious scruples against the death penalty as a punishment for crime were less than ideally unambiguous as to whether they would vote against capital punishment regardless of the facts or circumstances in any case. We cannot conclude, however, that the court erred in sustaining the State's challenge to these jurors. If the juror's answers be equivocal or qualified, further interrogation is permissible in order to ascertain his viewpoint. 35 Tex. Juris 2d., Jury, Sec. 115, p. 168. The appellant here made no such request for further interrogation. It has long been the holding of this Court that if it is doubtful whether the juror had conscientious scruples in regard to the infliction of capital punishment, the court's action in sustaining the State's challenge for cause on that ground will be sustained on appeal. *Burrell v. State,* 18 T. 713; *Sawyer v. State,* 47 S.W. 650; *Myers*

[5]Jurors Mrs. Clark Reynolds (Juror 29), Mrs. Elmer Wilson (Juror 90), Mr. J. B. Holt (Juror 125).

v. State, 177 S.W. 1167; *Vickers v. State,* 242 S.W. 1032; see also Article 35.21, V.A.C.C.P.

Further, before we could say the trial court, who saw these three jurors and heard their answers, was in error in its rulings, it must be observed that the appellant was granted an extra or sixteenth peremptory challenge which was exercised. Just prior to the selection of the twelfth juror (George Osburn, No. 126), the appellant was offered his seventeenth peremptory challenge which he rejected and insisted upon the seating of the twelfth juror.

We are convinced that in the selection of the jury in the case at bar the State did not cross the "line of neutrality" with respect to penalty,[1] and we perceive no reversible error. Our holding is supported by the recent decision of the New Jersey Supreme Court in *State v. Mathis,* —— A.2d. ——, 3 Cr. L. 2288 (7/3/68).

The impact of Witherspoon upon Texas in the selection of jurors in capital cases where the State is seeking the death penalty will not, while undoubtedly sharpening the traditional practice, so much affect that practice as it will the necessity for preserving for appellate review the manner of that selection. It will certainly be advisable in the future for the court, whether requested by either party or not,[2] to have the court reporter record the voir dire examination of the jury panel, (see *Evans v. State,* —— S.W.2d ——, No. 41,226, this day decided) and to include in every appel-

[1] In Witherspoon the defendant had contended that the death qualified jurors would also be unable to render an impartial decision upon the issue of guilt or innocence, but the court felt the data produced was insufficient to show that such jurors would tend to favor the prosecution.

[2] See Article 40.09, Sec. 4, V.A.C.C.P.

late record the jury list indicating the jurors chosen, the ones excused and the reasons therefor, etc.

In his next ground of error appellant contends that Criminal District Court No. 3 of Tarrant County lacked the authority to impanel the Grand Jury which returned the indictment against him, and that his motion to quash the indictment should have been granted. We find no merit in appellant's contention. Section A of Article 1926-44, V.A.C.S., which created the said Criminal District Court No. 3 in 1965, provides as follows:

> "A. Creation and Jurisdiction
> The Criminal District Court No. 3 of Tarrant County is created. Its jurisdiction is identical with that provided by law for the Criminal District Court of Tarrant County and the Criminal District Court No. 2 of Tarrant County and shall be exercised concurrently."

While the Act creating the court does not contain express authority to impanel a grand jury, Articles 1926-41 and 1926-43, V.A.C.S., creating the Criminal District Court of Tarrant County (now Criminal District Court No. 1, Acts 1967, 60th Leg., p. 1792, ch. 682, Sec. 1) and the Criminal District Court No. 2 of Tarrant County expressly authorizes those courts to impanel grand juries. Therefore, from the language of Article 1926-44, Sec. A, supra, quoted above, we fail to perceive any limitation upon the power of the said Criminal District Court No. 3 preventing it from doing anything which the other Criminal District Courts of Tarrant County could do, including the organization of a grand jury. Cf. *Walker v. State,* 267 S.W. 988; *Robinson v. State,* 274 S.W. 137. We are not persuaded that the amendment to Section F of Article 1926-44, supra,

effective after appellant's trial, gave the court the necessary authority to impanel grand juries for the first time. See Acts 1967, 60th Leg., p. 1792, ch. 682, Sec. 3, effective August 28, 1967.

In view of what we have said above, it is unnecessary for us to determine whether Criminal District Court No. 3 of Tarrant County, despite designation and the attempt to limit its jurisdiction, is also a regular constitutional district court which clearly has the power to impanel grand juries. See *Lord v. Clayton,* 352 S.W. 2d 718 and cases there cited.

We find no error in the trial court's refusal to strike the testimony of Dr. Feliks Gwozdz, the pathologist who conducted the autopsy on the deceased, because of the refusal of the State to stipulate as to the qualifications of the pathologist or to the fact that the deceased died of a gunshot wound to the head. Appellant urges that in view of his offer to stipulate there was no necessity to show the extensive experience and educational background of the pathologist or for such witness to exhibit to the jury the outline and drawing of the human head and to describe in detail the "horrible and shocking" condition of the deceased's head, and that such testimony was inflammatory. The burden of proof beyond a reasonable doubt rested upon the State to prove all the elements of the offense charged, including the cause of death. As stated by this Court in *Stokes v. State,* 286 S.W.2d 141,

> "An accused cannot, by admitting damaging features of the State's case, cut it off from making proof thereof." See also Reeves v. State, 32 S.W. 2d 471; Beard v. State, 171 S.W.2d 869.

Further, the use of the drawing or outline by the

pathologist to make his testimony as to the cause of death clearer to the jury does bring such drawing within the ghastly picture or bloody clothes rule. *Marion v. State,* 387 S.W.2d 56.

Ground of error #5 is overruled.

Appellant next complains that the trial court erred in refusing, when the State objected, to permit appellant's sister to testify that he had never been convicted of a crime and had not previously been arrested. Appellant admits that character in and of itself was not in issue but contends that such testimony was admissible in mitigation of punishment. It should be remembered that appellant's trial commenced before the 1967 amendment to Article 37.07, V.A.C.C.P., which authorizes bifurcated trials in capital cases where the death penalty is sought by the State. Article 37.07 as originally enacted had no application to pleas of not guilty in capital cases where the State is seeking the death penalty and such cases were to be conducted in one stage proceedings. *Rojas v. State,* 404 S.W.2d 30. Such procedure was followed in the case at bar. Therefore, the 1965 provisions of Article 37.07, Sec. 2(b), supra, permitting either party to offer evidence of the defendant's prior criminal record, character or reputation at the penalty stage of a bifurcated trial, was not available to the appellant. Neither had he filed an application for probation and the testimony offered was not admissible for that purpose.

As appellant acknowledges, the good character of the accused at this one stage trial could not be proved by testimony that he had not previously been charged or convicted of a criminal offense. Only recently in *Smith v. State,* 414 S.W.2d 659, this Court said:

"An accused may introduce evidence of his good character to show that it is improbable that he did the act charged. Hamman v. State, 166 Tex.Cr.R. 349, 314 S.W.2d 301; Jones v. State, 10 Tex. App. 552; McCormick & Ray's Texas Law of Evidence, Vol. 2, p. 332, Sec. 1492; 22A C.J.S. Criminal Law Sec. 676, pp. 699-700.

"It appears to be the settled law, however, that the good character of the accused may not be proved by testimony that he has never been previously charged with or convicted of a criminal offense. Perez v. State, 221 S.W.2d 915; Marberry v. State, 106 Tex.Cr.R. 474, 292 S.W. 1107; 23 Tex.Jr.2d 262, Sec. 171.

"The inquiry as to character must be limited to the general reputation of the person in the community of his residence or where he is best known. Brownlee v. State, 13 Tex. App. 255; Watson v. State, 156 Tex.Cr.R. 585, 244 S.W.2d 515; 23 Tex. Jr.2d 260, Sec. 171."

In *Smith,* similar testimony as that offered here was held inadmissible when offered only at the guilt or innocence stage of a bifurcated trial under the provisions of Article 37.07, supra, despite the fact that the appellant Smith had filed a probation application. Such testimony in Smith would have been clearly admissible at the penalty stage of such proceedings, but it was not again offered.

In the case at bar, regardless of *Rojas v. State,* supra, if the trial judge had conducted a bifurcated trial at appellant's request or without his objection, the testimony offered would have been admissible at the penalty stage of the proceedings and a different question would have been presented.* *Williams v. State,* 415 S.W.2d

*The same will also be true under the 1967 amendment to Article 37.07, applicable now to pleas of not guilty in capital cases where the State seeks the death penalty.

917. Such did not occur and we perceive no error in the trial court's action. Ground of error #8 is overruled.

In ground of error #9 appellant contends the trial court erred in failing to charge the jury that if the appellant indicated at any time prior to or during interrogation his desire to remain silent, such interrogation should have ceased, and if it did not, that any statement thereafter made could not be considered *"nor any evidence obtained as a result thereof."* It is claimed that appellant's refusal to sign the polygraph consent form was his indication or wish to remain silent. Reliance is had upon Article 38.22, V.A.C.C.P., and *Morales v. State,* 427 S.W.2d 51. We reaffirm what was said in *Morales v. State, supra,* but we fail to find any timely objection to the court's charge on the *particular* basis contained in this ground of error. See Article 36.14, V.A.C.C.P. Nothing is presented for review. The State contends that the evidence did not raise the issue of voluntariness before the jury and the court need not have charged thereon. Since the court did so charge, it would perhaps have been desirable if there had been full compliance with Article 38.22, supra, though, for the reasons stated no reversible error is perceived.

Appellant's grounds of error #3, 6, 7, 10 and 11 deal with the contention that appellant's oral confession, as well as his written confession, was taken and admitted into evidence contrary to Articles 15.17, 38.21, and 38.22, V.A.C.C.P., and his "constitutional rights." We cannot agree.

The record reveals that this appellant was arrested for speeding in the deceased's automobile in an isolated area after a high speed chase by police at 3:50 a.m. on September 23, 1966. Being unable to give the officers a satisfactory explanation as to his possession of the

vehicle, he was placed in jail at 4:22 a.m. At 10:30 a.m. the appellant, who was to be nineteen years old the following day, was taken before Corporation Court Judge VanMeter who gave him the warnings required by Article 15.17, supra, in connection with the alleged theft offense, and the appellant indicated to the magistrate he had no questions or requests. It is observed that from his arrest until these warnings there had been no in-custody interrogation of appellant. Between 1 and 2:40 p.m. appellant was interrogated by Fort Worth City Detective A. I. Weaver concerning the automobile theft. During this questioning appellant was offered the opportunity to call his family, an attorney or any friends, which he declined. Being unable to locate the owner of the automobile to determine if appellant had borrowed the same, Officers Harrison and Jones again questioned appellant between 4:50 p.m. and 5:40 p.m. During this time he agreed to a lie detector test and was returned to his jail cell until 7:55 when he was taken before polygraph examiner D. E. Wheeler. There appellant refused to sign the polygraph consent form, and Officers Harrison and Jones left for a nearby cafeteria leaving appellant in the custody of Wheeler. Reminding appellant of his right to remain silent, Wheeler began to inquire about the car theft. Shortly thereafter appellant told Wheeler that he had shot the deceased, Kenneth Eugene Jones, at Lake Arlington and had taken his car. He offered to lead the officers to the scene. At this point the officers had no knowledge of the murder. Appellant was then taken at 9:10 p.m. before Justice of the Peace W. W. Matthews who again warned him in accordance with Article 15.17, supra, and informed him he was accused of murder, and had him sign the written warning form. Thereafter appellant lead the officers to the shores of

Lake Arlington and the bushes where he had hidden the body of the deceased who had been fishing when shot. He then directed the officers to his home where the rifle used was recovered, subsequently pointed out the pawn shop where he had purchased the rifle, and located in his jail cell the shell casing of the fatal shot which had been hidden therein after his arrest. At 12:20 a.m. on September 24, 1966, appellant was taken to the District Attorney's office. There he was again warned of his rights in accordance with Article 38.22, supra, by Charles Butts, assistant district attorney, and reminded of his right to counsel. Following such warnings appellant gave a written confession. The oral confession was subsequently reduced to writing and signed by a non-police witness, as required by the then existent version of Article 38.22, supra.

Appellant's sister did testify that appellant, the oldest of seven children who lived with their parents, had quit school in the 11th grade, and had done failing work in the 8th, 9th and 10th grades. We find nothing, however, to indicate that he was incapable in any way of making an intelligent, voluntary and knowing waiver of his rights. There is no evidence that appellant was threatened, tricked or cajoled into a "waiver." The appellant was not held incommunicado nor was there lengthy and uninterrupted interrogation which would mitigate against the finding of a valid waiver.

Before the confessions were admitted into evidence before the jury, the court conducted a separate hearing on the admissibility and voluntariness of the same and reduced its findings to writing. See Article 38.22, supra.

Considering the "totality of circumstances," we are convinced that the requirements of the Texas statutes

and the dictates of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, have been met. See *McCandless v. State,* 425 S.W.2d 636; *Charles v. State,* 424 S.W.2d 909; *Anders v. State,* 426 S.W.2d 226; *Gunter v. State,* 421 S.W.2d 657, *Torres v. State,* 422 S.W.2d 741.

We reject appellant's claim advanced without authorities that the court erred in admitting into evidence the written warning form used by Justice of the Peace Matthews and signed by appellant. The exhibit was clearly admissible to demonstrate a compliance with Article 15.17, supra, and as tending to show waiver by the appellant. It is observed that the non-incriminating exhibit was not signed until appellant had been twice warned in accordance with Article 15.17, supra. Ground of error #13 is overruled.

Further, we find no error in the court's refusal to delete from appellant's written confession references to blood and "where body of deceased had been dragged and hidden in bushes" because of its inflammatory and prejudicial nature. We do not deem the authorities cited relating to the introduction of photographs showing blood or bloody garments as here controlling. Ground of error #14 is overruled.

Both the State and appellant's court appointed counsel are to be commended upon the excellent quality of their respective briefs. The same has been of tremendous value to this Court in its study of over 2,000 pages of this record.

Finding no reversible error, the judgment is affirmed.

Onion, Judge

(Delivered July 24, 1968)

No. 41,393

MELVIN STUART PITTMAN, Appellant

Vs.

THE STATE OF TEXAS, Appellee
Appeal from TARRANT County

OPINION ON APPELLANT'S MOTION FOR REHEARING

This Court does not hesitate to reverse where it is apparent that the trial court has excluded from the jury all persons expressing general objections to or conscientious or religious scruples against the infliction of death as punishment for crime as enunciated by the Supreme Court of the U. S. in *Witherspoon v. Ill.,* supra. See Ex parte William Clark Bryan, Jr., #41, 618, and *Ellison v. St.,* #40,072, this day decided. We do, however, remain convinced of the soundness of our original disposition of the case at bar.

The amicus curiae brief, as well as appellant's brief on rehearing, presented and so ably argued, expects and says that in *Witherspoon* the Supreme Court held that perfection must be achieved in the examination of every venireman. With this drastic standard we, as practical lawyers who have sat on the trial benches of this State and have qualified veniremen to serve in cases where the death penalty has been sought, are not inclined to agree. It may be that the Supreme Court has written a rule of law whereby no death penalty conviction could ever be upheld even though that is exactly what they say they were not doing. We must accept them at their word and re-examine our original opinion.

It would serve no useful purpose, as we see it, to review in this opinion the examination, cross-examination, or lack of cross-examination, of each of the 126 veniremen examined in this case. This was done exhaustively by the author of the original opinion. Where, as here, several of the venire expressed their convictions against the infliction of the death penalty and appellant's counsel, evidently being satisfied with the veniremen's statements or because he did not want the veniremen for some other reason, made no effort to qualify them for service, we do not conclude that it becomes the duty of the court to take other steps toward attempting to qualify the veniremen. Veniremen may still be excused by agreement in this State; and it is our view that the rule set forth in Footnote 21 in *Witherspoon* has application to veniremen whom appellant seriously tried to qualify for service, and serves as an excellent guideline in such cases. We think, however, that it should not be construed as imposing upon trial courts additional duties when it is evident that the accused did not want the venireman as a juror. This is why we pointed out in our original opinion that "the appellant here made no such request for further interrogation."

This is not a case where the manner of jury selection is shown by stipulation only, which reflects a violation of the *Witherspoon* standards as was the case in *Spencer v. Beto*, 398 F.2d 500 (5th Cir.).

Remaining convinced that this cause was properly decided originally, appellant's motion for rehearing is overruled.

Morrison, Judge

CONCURRING OPINION

Believing that this appeal was properly decided on original submission, and upon authority of the opinions in *Scott v. St.*, #41,373; *Ellison v. St.*, #40,072, and *Ex parte Bryan*, #41,618, this day decided, I concur in the overruling of appellant's motion for rehearing.

Woodley, Presiding Judge

(Delivered October 30, 1968)

APPENDIX D

Evans v. Texas, 430 S.W. 2d 502
(October 30, 1968)

NO. 41,226

CLARENCE WESLEY EVANS, Appellant

vs.

THE STATE OF TEXAS, Appellee
Appeal From TARRANT County

OPINION

The offense is rape; the punishment, death.

The prior opinions are withdrawn.

The disposition of this cause makes it necessary to consider only the appellant's contention that the trial court erred in refusing a court reporter when requested, to take the voir dire examination of the jury panel.

Art. 40.09(4) C.C.P., provides in part:

> "At the request of either party the court reporter shall take shorthand notes of all trial proceedings, including voir dire examination, * * *."

The determination of whether the requirements were complied with during the selection of a trial jury must be reviewed and appraised in accordance with the appellate record and the applicable statutes.

It was stipulated at the hearing on the second amended motion for new trial that 44 of 98 prospective jurors were challenged for cause by the state and excused by the court by virtue of their conscientious scruples against the infliction of the death penalty as punishment for crime in a proper case.

In support of the allegations in his second amended motion for a new trial that his requests for a court

reporter to take the voir dire of the veniremen was denied, defense counsel, Toby Goldsmith, testified in part as follows:

> "A. The first juror—according to my notes—and I remember of her as being a lady, but my notes show that she was Mrs. Ruby Johnson. . . . Mrs. Johnson disqualified, according to The Court's ruling, on the death penalty. . . . In other words, she was challenged for cause by The State, and excused by The Court. . . . Immediately after the State challenged Mrs. Ruby Johnson for cause, I requested of The Court, that he allow me to ask certain questions pertaining to her qualifications. The Court refused this request. . . . I then asked for a Court Reporter to take down the rulings of The Court. . . . I was instructed by The Court that I was not entitled to a Court Reporter; that if I disagreed with the rulings of The Court, to get me some by-standers' Bills. . . . Mrs. Ruby Johnson was then excused on the challenge for cause by The Court, and there was no Court Reporter reporting notes or recordings of the testimony of Mrs. Ruby Johnson, as pertaining to her qualifications, on voir dire."

The witness, Goldsmith, further testified that the court reporter took the voir dire of the first or second jurors, and maybe another, but recalls that the reporter was not in the courtroom after that; that he was allowed to examine some of the jurors challenged by the state but his requests to examine others were refused; and that after his examination of one or two jurors his further requests for a court reporter were denied, and that his requests were never withdrawn, but were renewed.

Tim Curry, also of counsel for the appellant, testified in part as follows:

"A. * * * Some time, directly after the beginning of the examination, Mr. Goldsmith requested a Court Reporter, to take down the voir dire examination. . . . At that time, The Court denied his request; and, after some discussion, The Court told him, or told all of us, that we could use By-Standers' Bills, to perfect the record; and that we were not entitled to a Court Reporter, on the voir dire examination. . . . As to one of the jurors, the Court Reporter did come in and take his examination down. . . . And after that juror—which was apparently the second juror—and for reasons which I don't know, the Court Reporter was not there at any other time. . . . I never agreed to waive the Court Reporter. . . . I never agreed that the Court Reporter could, at any time, leave the court room, during the voir dire examination. . . . And to my knowledge, I never heard any one connected with the defense of this case, waive, or agree, that the Court Reporter should not be present. . . .

"I remember, during the course of the voir dire examination, Mr. Goldsmith made several requests for a Court Reporter, in order to take the voir dire examination. . . . At one time, he made the request for a Court Reporter, in order to get into the record that the Court was denying him a Court Reporter. . . .

"And in answer to each of the requests, to my knowledge, we were always denied a Court Reporter by the Court. . . . That's the substance of my recollection."

Gary Cole, another counsel for the appellant, testified to substantially the same facts as the witnesses, Goldsmith and Curry.

Grady Hight, the assistant district attorney, who tried this case, testified in part as follows:

> "In the first particular juror here, Mrs. Ruby Johnson; she was a colored lady; these questions were asked. She disqualified; that is, she answered that she did have conscientious scruples and could not vote for the death penalty, no matter how serious the offense.
>
> * * *
>
> "In the case of Mrs. Johnson, The Court picked up her jury card from the stack in front of him, turned to her, and the words that he said were: 'Mrs. Johnson, you are excused. . . . Return to the Central Jury Room. . . . Do not discuss what has happened here in this court room with any one.' . . . That may not be word for word, but that is essentially what he told her.
>
> "It was not until that time that the Defendant through his Counsel, made the request for further voir dire examination. . . . The Court instructed the Counsel that he had already sustained the challenge to the juror. . . . Whereupon the Counsel requested permission to call the Court Reporter to make a formal Bill of Exception. . . . Again, as is the ordinary custom of the court, The Court instructed Counsel to make his formal Bill of Exception at a later time so as not to interrupt the proceedings of the court room.
>
> * * *
>
> "After some further discussion, I believe

The Court did inform Counsel that if he did not wish to make a formal Bill of Exception, that he could prepare a by-stander's Bill, which would take it up. . . . At that time, I spoke to The Court—I don't recall the exact words—but I stated that if Counsel would call for a Court Reporter for the next juror, The State would have no objection.

* * *

"At the conclusion of that juror's (the second juror) testimony, The Court told the Court Reporter to return to his office, and that he would call him again if and when he was needed. . . . I did not hear the Defendant, nor any of his counsel, make any objection to this. . . . And from that time on, at the begining of each prospective juror's testimony, there was no objection made because a Reporter was not present and taking down the questions and answers.

"The Court continued to follow the policy, from that time on, that whenever a request for further voir dire examination was made, before The Court had ruled and excused the juror, the Defense Counsel were permitted to so examine the jurors. . . . And this happened in numerous instances. . . . If the request for further voir dire examination, did not come until after The Court had made his ruling, The Court did not permit further examination. . . .

"On two or three other instances, the Reporter was requested for the purpose of perfecting the formal Bill of Exception. . . . And in each instance, The Court informed Defense counsel to perfect their Bill of Exception at a later time, so as not to interfere with the selection of the Jury."

Lee S. Henry, the court reporter, testified in part as follows:

"Q. (By Mr. Hight) Mr. Henry, at the conclusion of that witness' (2nd) testimony, did you do anything in preparation for the taking of the testimony of Juror No. 3, Mrs. John Taylor?

"A. Yes sir, I wrote her name down in my note book, and put down that she was the next witness on the list, as called by The Court.

"Q. What was said in the court room, at that time?

"A. At that time, Mr. Hight, I was excused; and I do not have anything down in my note book, nor is there any' thing on the machine; but I have a recollection of what it was.

"Q. What was that?

"A. The Court, in substance, said to me, or said to every one: 'I don't think we need Me. Henry any further; he will be here if we need him.'

"Q. Do you recall, at that time, any of the Defense Counsel making a statement: 'That's all right, if we can get him *him,* if we want him.'?

"A. I recall Mr. Goldsmith saying something to that effect; not those exact words. . . . But something like 'just so we can get him if we need him' or something like that. . . .

* * *

CROSS-EXAMINATION BY MR. GOLDSMITH:

"Q. Mr. Henry, did you say that in your notes,

after you wrote down the name of Juror No. 3, that is as far as they go?

"A. Yes sir.

"Q. And in it your testimony, based on your recollection only, that it was at that time that The Court told you words to the effect that you would be excused from taking down any more of the testimony of the jurors; is that correct?

"A. Well, Mr. Goldsmith, he didn't say that exactly.

"Q. Whatever he said there, you don't have that in your notes; is that correct?

"A. I do not; but I was excused."

The trial judge having refused the requests of the appellant to direct the court reporter to take the voir dire examination of the veniremen as shown which would necessarily include his rulings in passing on their qualifications, deprived the appellant of a transcription of the testimony and the court's ruling thereon and constitutes a denial of the right of review of his case by this court which is guaranteed to him by law. *Williams v. State,* 418 S.W.2d 837.

In the absence of the transcription of the voir dire of the jury panel, we will not here review the holding of the United States Supreme Court in *Witherspoon v. Illinois,* 3 Cr.L. 3109, which involved the basic attitudes of the venire panel toward the death penalty.

From the record, it is concluded that the ends of right and justice will best be served and maintained by according to the appellant, another trial.

The judgment of affirmance is set aside, appellant's motion for rehearing is granted, and the judgment of the trial court is reversed and the cause is remanded.

Belcher, Judge

(Delivered July 24, 1968)

APPENDIX E

Ellison v. Texas, ——- S.W. 2d ——
(October 30, 1968)

No. 40,072

JESSE ELLISON, Appellant

Vs.

THE STATE OF TEXAS, Appellee

Appeal from Falls County

OPINION

This conviction for robbery with a deadly weapon, with punishment assessed at death, was affirmed by this court in *Ellison v. State,* 419 S.W. 2d 849, and mandate issued November 17, 1967.

On June 17, 1968, the Supreme Court of the United States, in *Ellison v. Texas,* 3 Cr. L. 4101, granted certiorari and ordered that the judgment be vacated and the case remanded for reconsideration in light of *Witherspoon v. Illinois,* —— U.S. ——, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (decided June 3, 1968).

Transcript of the voir dire examination of the special venire now before this court fully supports appellant's bill of exception, approved by the trial court, which certifies that all prospective jurors who, upon questioning, stated that they *did not believe in the* death penalty *or* had conscientious scruples in regard to its infliction were challenged by the state and excused.

Art. 35.16 (b), Section 1, of the 1965 Code of Criminal Procedure provides that a challenge for cause may be made by the state for the reason "that the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a

capital case, where the state is seeking the death penalty."

"A challenge for cause is an objection to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. - - -" Art. 35.16 (a) V.A. C.C.P., 1965.

"Conscientious scruples" in regard to the infliction of death as punishment for crime was a ground for challenge in a capital case in this state even before the Original Code of Criminal Procedure (O.C. 575) provided for such a challenge. *White v. State,* 16 Tex. 207; *Burrell v. State,* 18 Tex. 713.

In affirming this conviction, the constitutionality of the present statute, as it relates to "conscientious scruples," was upheld by this court in light of the fact that the statute has never been construed as rendering a juror incapable or unfit to serve on the jury in a capital case where the state is seeking the death penalty simply because he did not believe in or voiced general objections to the death penalty.

We note, however, that Sec. b (3) of Art. 35.16, supra, also provides that a challenge for cause may be made by the state for the reason that the juror "has a bias or prejudice against any phase of the law upon which the state is entitled to rely for conviction *or punishment,*" and Sec. c (2) provides that a challenge for cause may be made by the defense for the reason that the juror "has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof *or of the punishment therefor.*"

The jury which assessed appellant's punishment at death first found him guilty. After the verdict finding him guilty of robbery with a deadly weapon was returned, the matter of punishment was referred to the same jury and, after separate hearing, death was assessed.[1]

As we understand the opinion of the Supreme Court in *Witherspoon v. Illinois,* supra, in its role as arbiter of the punishment to be imposed, appellant's jury "fell woefully short" of that impartiality to which he was entitled under the Sixth and Fourteenth Amendments but, as to the guilt or innocence issue, bias with respect to appellant's guilt is not shown.

The Texas Statute provides for a separate hearing on proper punishment before the same jury and provides that where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment when the jury finds the defendant guilty. And in the event the jury shall fail to agree, a mistrial shall be declared, the jury discharged and no jeopardy shall attach. Art. 37.07 V.A.C.C.P.[2]

Our statute provides that the Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may

---

[1]Such separate trials now required by Art. 37.07 as amended in 1967 (Art. 37.07 V.A.C.C.P.) were permissible under the 1965 statute. *Williams v. State,* 415 S.W. 2d 917; *Jones v. State,* 416 S.W. 2d 412. See also *Rojas v. State,* 404 S.W. 2d 30.

[2]Prior to the 1965 Code the statute provided that if the plea was not guilty the jury must find that the defendant is either "guilty" or "not guilty" and "they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty." Art. 693 C.C.P. (1925).

reverse and dismiss the case, or may reform and correct the judgment as the law and nature of the case may require. Art. 44.24 V.A.C.C.P.

Also, Art. 44.29 V.A.C.C.P. provides: "Where the Court of Criminal Appeals awards a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the court below."

It follows that this court is without authority to direct a new trial before a different jury on the issue of punishment only.

In obedience to the decisions of the Supreme Court of the United States and in compliance with the procedural statutes of Texas, the mandate issued upon the affirmance of this conviction is recalled and the judgment of conviction is reversed and the cause is remanded for a new trial.

Woodley, Presiding Judge.

(Delivered October 30, 1968.)

APPENDIX F

Ex parte William Clark Bryan, Jr.
—— S.W. 2d ——
(October 30, 1968)

No. 41,618

Ex parte WILLIAM CLARK BRYAN, JR.
Original Application

OPINION

This is a habeas corpus proceedings brought under the provisions of Art. 11.07, C.C.P., as amended (Acts 1967, 60th Leg., Ch. 659, p. 1734, eff. Aug. 28, 1967). The petitioner seeks to set aside as void his 1965 conviction for murder where the penalty imposed was death. Such conviction was affirmed by this Court in 406 S.W.2d 210.

On July 11, 1968, a habeas corpus petition was presented to the convicting court pursuant to the provisions of Art. 11.07, supra, and in compliance with the Order of the U. S. District Court, Southern Dist. of Texas, Houston Div., remanding applicant's Federal Petition for Habeas Corpus to the state trial court for determination of the issue of petitioner's mental competency to stand trial in 1965 in light of the decisions of this Court in *Townsend v. St.*, 427 S.W.2d 55, and *Morales v. St.*, 427 S.W.2d 51.

The convicting court refused to entertain the habeas corpus petition and denied the same without a hearing.

On July 12, 1968, the petitioner presented another habeas corpus petition to the convicting court contending, among other things, that the jury which imposed the death penalty upon him was selected in violation of the doctrine of *Witherspoon v. Ill.*, —— U.S. ——, 88 S.Ct. 1770, 20 L.ed. 2d 776, which decision of the U. S. Supreme Court is to be applied retroactively. See footnote 22 thereof. See also *Pittman v. St.*, #41,-

383, not yet reported. At the hearing granted upon such petition the only evidence presented was an agreed stipulation, both the State and the petitioner specifically declining the court's offer to hear any further evidence that either wished to present. Said written stipulation reflects that the voir dire examination of the prospective jurors was not recorded by the court reporter as no request was made for the same; that during petitioner's trial 44 of the 117 prospective jurors examined were challenged for cause by the State after such prospective jurors expressed conscientious or religious scruples against capital punishment, or expressed the opinion they were opposed to the death penalty in principle; that such prospective jurors were excused by the court upon challenge for cause by the State "solely because they expressed either general objections to the death penalty, or conscientious or religious scruples against its infliction" that none of the challenged jurors was questioned further to determine whether or not they could, in a proper case, set aside their scruples and assess the death penalty if such penalty were justified by the facts, nor whether their attitude toward the death penalty would prevent them from making an impartial decision as to defendant's guilt.

The judge of the convicting court, who also was the trial judge at petitioner's trial, entered findings of fact in accordance with the stipulation, but concluded that the jury was selected in compliance with Arts. 35.15, 35.16 and 35.17, C.C.P. These articles did not become effective until Jan. 1, 1966, which was after the date of petitioner's trial. Obviously, the judge meant to refer to the statutory provisions for selecting jurors in capital cases under the former Code. The

record of such habeas corpus proceedings was transmitted to this Court. See *Ex parte Young,* 418 S.W.2d 824.

The petitioner has now filed a new habeas corpus petition in this Court seeking to invoke our original jurisdiction under the procedure authorized in *Ex parte Young,* supra, raising both the mental competency and jury selection issues. Such new petition was utilized to invoke our original jurisdiction as to the mental competency question since the convicting court denied the petition presented to it on July 11 without a hearing, *Ex parte Young* at p. 830, but was unnecessary as to the jury selection question where the petitioner was accorded a hearing. Nevertheless, these matters have been consolidated, docketed, and submitted and will be considered together.

In *Witherspoon v. Ill.,* supra, the Supreme Court held that due process voided a death sentence imposed by a jury from which were excluded all persons expressing general objections to or conscientious or religious scruples against capital punishment.

The holding is clarified to some extent by Mr. Justice Stewart, who delivered the majority opinion, when he wrote:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition

in the case before them." See also footnote 21 of said majority opinion.

Further, in footnote 9 of the *Witherspoon* opinion the Court said in part:

"* * * it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' (see *People v. Randhauer*, 66 Cal.2d 524, 531, 426 P. 900, 905) thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him. See also the *voir dire* in *Rhea v. St.*, 63 Neb. 461, 466-468, 88 N.W. 789, 790. Cf. *State v. Williams*, 50 Nev. 271, 278, 257 P. 619, 621. Obviously many jurors 'could, notwithstanding their conscientious scruples (against capital punishment), return . . . (a) verdict (of death) and . . . make their scruples subservient to their duty as jurors.' *Stratton v. People*, 3 Col. 276, 277. Cf. *Commonwealth v. Henderson*, 242 Pa. 372, 377, 89 A. 567, 569. Yet such jurors have frequently been deemed unfit to serve in a capital case. See e.g., *Rhea v. St.*, supra, 63 Neb. at 470-471, 88 N.W., at 791-792. See generally W. Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt? 39 Tex. L.Rev. 545, 547-548 (1961); Comment, 1968 Duke L.J. 283, 285-289.

"The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any 'layman . . . (might) say he has scruples if he is somewhat unhappy about death sentences. . . . (Thus) a general question as to the presence of . . . reservations (or scruples) is far from the inquiry which separates those who

would never vote for the ultimate penalty from those who would reserve it for the direst cases.' Id., at 308-309. Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."

It is clear from the stipulation and the findings of the trial court that the jury in petitioner's case was selected in violation of *Witherspoon*, and that a substantial number of the jury panel was "excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment." *Witherspoon* at 88 S.Ct. 1773. Thus the State crossed the "line of neutrality" with respect to penalty in the selection of the jury.

In *Witherspoon*, despite the petitioner's contentions to the contrary, the Court found the data adduced "too tenative and fragmentary to establish jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." Thus the Court refused to adopt a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as was the one in *Witherspoon*. Such holding raises the possibility of holding a separate hearing on punishment at this time in the case at bar in order that the requirements of *Witherspoon* be met.

However, it is observed that petitioner's one stage 1965 trial was conducted prior to the effective date of the 1965 Code of Criminal Procedure and to the 1967 amendment to Art. 37.07, C.C.P., authorizing for the first time bifurcated trials in capital cases where the State is seeking the death penalty. As to the trial of such capital cases under the said 1965 Code prior to

said 1967 amendment, see *Rojas v. St.*, 404 S.W.2d 30; *Williams v. St.*, 415 S.W.2d 917; *Jones v. St.*, 416 S.W. 2d 412; *Wilhelm v. St.*, 426 S.W.2d 850.

Even if the case at bar had been tried under the provisions of Art. 37.07, supra, "this Court is without authority to direct a new trial before a different jury on the issue of punishment only." *Ellison v. St.*, #40,-072, this day decided. See also Arts. 44.24, 44.29, C.C.P. Therefore, petitioner is entitled to a new trial.

In the event of a new trial the district court's attention with regard to petitioner's competency to stand trial is directed to *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.ed. 2d 815, and the decisions of this Court in *Townsend v. St.*, supra, and *Morales v. St.*, supra.

The relief prayed for is granted, the petitioner is ordered remanded to the Sheriff of Fort Bend County to answer the indictment in Cause #8450 in the 24th District Court.

It is so ordered.

Onion, Judge

(Delivered October 30, 1968)

APPENDIX G

Scott v. Texas, —— S.W. 2d ——
(October 30, 1968)

No. 41,373

WILLIAM SCOTT, JR., Appellant

v.

THE STATE OF TEXAS, Appellee
Appeal from Brazoria County

OPINION

The offense is rape; the punishment, death.

Appellant's brief filed in the trial court sets forth six grounds of error.

Ground 1 complains of the overruling of his motion to suppress the written confession; the finding that such confession was freely and voluntarily made; and the failure to find that appellant had knowingly and intelligently waived the appointment of counsel at the time the statement was given.

The confession in writing made Oct. 18, 1966, was introduced in evidence at appellant's trial on Sept. 5, 1967.

The evidence adduced at the hearing on the issue of voluntariness before the court, in the jury's absence, and the confession signed by appellant show that the requirements of Arts. 38.22 and 15.17 of the 1965 C.C.P. were fully complied with and that the confession was freely and voluntarily given following the warning required by said statutes.[1]

The findings of the trial judge which appear in the

[1] ". . . The provisions of this Act shall not affect the admissibility of confessions made prior to the effective date of the Act." Acts 60th Leg., 1967, Sec. 41, p. 1752.

record are fully supported by the evidence offered at the hearing and sustain his action in overruling the motion to suppress and admitting the written confession in evidence. *Charles v. St.,* 424 S.W.2d 909; *McCandless v. St.,* 425 S.W.2d 636; *Anders v. St.,* 426 S.W.2d 228, sustain our holding that the written confession was not inadmissible under *Miranda v. Ariz.,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.ed. 2d 694, decided June 13, 1966.

Ground of error #2 complains that the court erred in admitting a billfold in evidence.

In his confession that was reduced to writing appellant referred to having lost his billfold at the park where the rape occurred. At the County Jail, the day after his written confession, appellant advised Texas Ranger Rundell that he had lost some property at the scene of the rape. He accompanied Officer Rundell and a deputy sheriff to the place where appellant advised that the crime had occurred and appellant kicked grass off of the billfold, picked it up and handed it to Officer Rundell and said it was his billfold.

The statement of the appellant made after the warning that had been previously given him, and the statement which led to the finding of the billfold at the scene, as well as the billfold, were admissible. Art. 38.22, Sec. 1(e), C.C.P.; *Valtiero v. St.,* 219 S.W.2d 73.

Ground No. 3 complains that the court erred in failing to charge the jury on the lesser included offense of assault with intent to commit rape.

The state's evidence, including the testimony of the victim and the confession of appellant, shows that the crime of rape was repeatedly committed by appellant

as well as his co-conspirators upon the victim named in the indictment. We find no evidence which raised the issue of a lesser assault. We see no error. *Keeton v. St.*, 190 S.W.2d 820.

Ground No. 4 complains that the trial court erred in failing to instruct the jury to make an independent finding as to the voluntariness of both the written and oral confessions or statements of the defendant.

If we understand the contention presented by this ground of error, it is that the jury as well as the trial judge must make independent findings on the issue of voluntariness before the confession is read to the jury. With such contention we are unable to agree.

The admissibility of the confession is determined by the court. When found to be voluntary and admissible it may be read to the jury.

The instruction to be given the jury when there is evidence before it as to voluntariness, etc., relates to their consideration of the confession—not its admissibility. Art. 38.22, C.C.P.

Ground of error No. 6 complains of the refusal of the court to grant a mistrial after state's witness Ashcraft, on cross-examination, was asked and answered:

"Q. Mr. Garcia, I hand you Defendant's Exh. No. 1, and ask you to examine— A. I am not Mr. Garcia.

"Q. I am sorry Mr. Ashcraft. A. What did you want to know, Mr. Lee?

"Q. I ask you to examine it. A. Yes sir, I have examined it.

"Q. All right. A. That is another rape."

The trial judge instructed the jury to disregard the statement.

Under the record which shows that the 20-year old girl, who testified that she was a virgin, was raped by appellant 5 times and 6 times by his co-principals in his presence, the failure of the trial judge to declare a mistrial is not error. The answer of the witness was not so prejudicial as to constitute ground for reversal.

After this appeal had reached this court, but before it was submitted, the Supreme Court of the U.S. handed down its decision in *Witherspoon v. Ill. et al.*, —— U.S. ——, 88 S.Ct. 1770, 20 L.ed. 2d 776 (decided 6/3/68). Appellant was permitted to file supplemental brief presenting the contention that the jury which assessed his punishment at death was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious scruples against its infliction.

Transcript of the voir dire examination of the venire reflects that some jurors who answered that they had conscientious scruples against the infliction of death as punishment for crime were challenged and excused without further examination and without objection. However, the record leaves no doubt that the court and counsel for the state recognized the correct test followed in this state in passing on challenges made to prospective jurors for cause under Sec. b(1) of Art. 35.16, C.C.P., which provides:

> "(b) A challenge for cause may be made by the state for any of the following reasons:
>
> "1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case,

where the State is seeking the death penalty. . . ."

We quote from the voir dire examination in this regard of some of the first veniremen:

James R. Yancy:

"Q. Now, let me ask you this sir; do you have any conscientious scruples against infliction of the death penalty in a proper case? A. Yes, sir. I don't believe I could take another man's life this way.

"Q. Is it your thought then, that your conscience and your scruples, religious, moral or whatever they may be, prohibits you from giving the death penalty? A. Yes, sir. I don't say that I wouldn't take another life if the cause granted, but as far as me—

"Q. Sitting as a juror— A. Sitting as a Juror, I don't believe I could."

M. C. Hoffpower:

"Q. - - - Now, the punishment as set by the laws of Texas; should a person be convicted of rape, is by death, by confinement in the penitentiary for life, or for any term of years not less than five. Now, based upon that, let me ask you, the law and the punishment attached thereto; do you have any conscientious scruples against infliction of the death penalty? A. No.

"Q. To make sure you fully understand what we are talking about in conscientious scruples against the infliction of the death penalty. We are not talking about this case or I am not talking about this case, but where the facts show that there has been a brutal rape

and hideous crime committed, there is no question about that, and where the law prescribes that the penalty of death may be inflicted, could you vote a death penalty? A. Yes sir.

"Q. Your morals and beliefs would not prohibit you from doing such? A. No."

Shirley K. Smallwood:

"Q. - - - Now, as punishment for the offense of rape or one who is convicted of it, he may be punished by death or by confinement in the penitentiary for life or for any term of years not less than five. Now, with this in mind, let me ask you, do you have any conscientious scruples against the infliction of death as a punishment for crime? A. No.

"Q. Let me make sure that I fully understand your answer and that you understand my question. In this case, the State is asking for the death penalty. Now, take a case, not this particular case but if the evidence and the testimony is strong enough, and if you believe beyond a reasonable doubt that the testimony and the evidence, and if the law as above authorizes the death penalty, then, will your conscience allow you to give the death penalty, if you think it is the right thing to do? A. Yes."

On cross-examination:

"Q. All right, now, Mr. Bass asked you awhile ago in a proper case, you would have no conscientious scruples against the infliction of the death penalty, by the same token, if a crime was not of a supreme type crime that required the death penalty, would you have

any conscientious scruples against assessing a lower penalty than that. A. No, sir."

Mrs. Don Copeland:

"Q. Now, the Texas Law defines the punishment that may be inflicted upon a conviction of a crime of rape, and the punishment set forth is this; death or by confinement in the penitentiary for life or by confinement in the penitentiary for any term of years for not less than five. Now, bearing in mind the foregoing punishment, do you have any conscientious scruples against the infliction of the death penalty? A. No, sir, I don't.

"Q. So that we fully understand each other, Mrs. Copeland, the State is asking for the death penalty in this case. If you were chosen as a Juror, and the testimony was strong enough, and the law authorized it, and the proof is beyond a reasonable doubt that the crime had been committed, and you believed that the death penalty should be given, will your conscience allow you to give that death penalty? A. Yes sir, it would."

Mr. John H. Brown, Jr.

"Q. - - - Keeping this in mind, Mr. Brown, do you have any conscientious scruples against the infliction of the death penalty? A. No.

"Q. Are you positive in that answer of no? A. Yes.

"Q. So, that we fully understand each other in this case, the *case* is seeking the death penalty, and if the testimony is strong enough, and the law does authorize it and it is proved beyond a reasonable doubt, and you believe that the death penalty should be given, would your conscience allow you to vote the death penalty? A. Yes."

W. C. Parks:

"Q. Now, *under the same law sets* the punishment that may be applied upon conviction for the offense of rape and that punishment is: 1, death, another is by confinement in the penitentiary for life or the 3rd is for confinement in the penitentiary for any term of years not less than five. Now, bearing in mind what I just stated to you, do you have any conscientious scruples against the infliction of the death penalty? A. Yes, sir.

"MR. BASS: Challenge for cause, Your Honor.

"MR. WHITWORTH: Could I ask a question?

"THE COURT: Go ahead.

"EXAMINATION BY MR. WHITWORTH:

"Q. Mr. Parks, you say you do have conscientious scruples. Now, by that, do you mean regardless of the circumstances that you could not bring in a verdict to punish by the death penalty? A. I feel like that's right.

"Q. In other words, your answer is, a total unqualified answer? A. Yes."

Mrs. Ned Joiner:

"Q. - - - Now, keeping in mind what the punishment is, Mrs. Joiner, do you have any conscientious scruples against the infliction of the death penalty? A. Yes sir, I do.

"MR. BASS: Challenge for cause, Your Honor.

"MR. WHITWORTH: May we question her?

"THE COURT: Go ahead.

"EXAMINATION BY MR. WHITWORTH:

"Q. Mrs. Joiner, you say you have conscientious scruples against the death penalty or capital punishment, by that, do you mean regardless of the facts and circumstances of any given case where the law authorizes the death penalty regardless of the facts, you could not in good conscience, return a verdict of death? A. No sir, I couldn't.

"Q. You could not? A. No.

"THE COURT: You are excused."

The fact that one or more veniremen may have been excused on challenge for cause without a full showing that they would not in any case vote for the death penalty does not mean that the jury was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or that the state "stacked the deck" against appellant.

It means simply that counsel for the defense did not see fit to examine them further, either because he did not want the particular juror or because he was satisfied that they understood that, having scruples against the death penalty, they would not consider voting for the death penalty in any case.

The record reflects that the state did not exhaust its peremptory challenges and the question of whether the court erred in sustaining a particular challenge for cause is not presented as ground for reversal.

Pittman v. St., #41,393, this day decided, sustains our conclusion that *Witherspoon v. Ill.*, supra, is not authority for setting aside this death penalty conviction.

As to remand for assessment of punishment, see *Ellison v. St.*, #40,072, and *Ex parte William Clark Bryan, Jr.*, #41,618, this day decided.

The judgment is affirmed.

Woodley, Presiding Judge

(Delivered October 30, 1968)